

**STEVEN P. SWOPE**  
Claimant

**BEST YET REFUSE**  
Respondent

**NATIONWIDE MUTUAL INS. CO.**  
Insurance Carrier

## ORDER

## ISSUES

Respondent does not deny that claimant was involved in a work related accident on May 1, 2003, but denies claimant was injured as a result of that accident. As such, respondent contends the ALJ erred by awarding benefits.

On May 1, 2003, claimant was driving a truck as a part of his regular job duties with respondent when it was involved in an accident with another truck. This is not disputed. Accordingly, the Appeals Board (Board) finds the accident arose out of and in the course

of claimant's employment. What is disputed is whether or not claimant was injured as a result of that accident.

This is an appeal from a preliminary hearing order. Consequently, the Board's jurisdiction to review preliminary hearing findings is limited. At this stage of the claim, not every alleged error is subject to review. Generally, the Board can review preliminary hearing orders in which an administrative law judge has exceeded his or her jurisdiction.<sup>1</sup> Moreover, the Board has specific authority to review the preliminary hearing issues listed in K.S.A. 44-534a, which are:

- (1) whether the worker sustained an accidental injury,
- (2) whether the injury arose out of and in the course of employment,
- (3) whether the worker provided the employer with timely notice and with timely written claim, and
- (4) whether certain other defenses apply.

The term "certain defenses" refers to defenses that dispute the compensability of the injury under the Workers Compensation Act.<sup>2</sup>

The issues of whether a worker needs ongoing medical treatment or whether the worker satisfies the definition of being temporarily and totally disabled are not jurisdictional issues listed in K.S.A. 44-534a that are subject to review from a preliminary hearing order. Those issues do, however, comprise questions of law and fact over which an administrative law judge has the jurisdiction to determine at a preliminary hearing.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.<sup>3</sup>

The nature and extent of claimant's injury is not a jurisdictional issue. Therefore, if it is determined that claimant was injured by the work related accident, the Board will not review the ALJ's orders concerning medical treatment and temporary total disability

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<sup>1</sup> K.S.A. 2003 Supp. 44-551(b)(2)(A).

<sup>2</sup> *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

<sup>3</sup> *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

compensation. However, if the Board finds that claimant was not injured in the May 1, 2003 accident, then the ALJ's award of preliminary benefits to claimant should be reversed.

Claimant alleges he injured his "neck, bilateral shoulders and upper extremities, back and right lower extremity." <sup>4</sup> Respondent contends the accident caused minor damage to the vehicle and was insufficient to have caused injury to the claimant. "On Thursday, May 1, 2003, the driver's side mirror of the company truck that the claimant was driving clipped the driver's side mirror of an oncoming truck. Glass from the company truck's side mirror and window landed on the claimant. " <sup>5</sup>

Claimant's brief describes the accident a bit differently: "The claimant was involved in a motor vehicle accident on May 1, 2003, that collided with such force that it ripped part of the vehicle's door from the truck and shattered the driver's side window." <sup>6</sup>

Claimant testified as follows:

Q. (Ms. Franklin) Can you briefly tell the Judge what happened?

A. (Mr. Swope) I was - - I went to the landfill and was returning to my trash route from the landfill and we just -- there was a transfer truck in my lane and we hit breaking my driver's side mirror and window. Glass shattered all over me and I - - after the accident, I stopped and immediately called my manager or foreman over a cell phone and told him.

Q. Steve, listen real close to the questions and only answer the questions that are asked, okay?

During the impact, did your body have any kind of jarring effect from that accident? Or how did your body move when the other vehicle struck your vehicle?

A. I jerked to the right. <sup>7</sup>

Claimant reported the accident to his supervisor and to the Kansas Highway Patrol. As a result of the accident, claimant was terminated. Claimant did not report that he was injured, nor did claimant request medical treatment from respondent. The first notice

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<sup>4</sup> K-WC E-1 Application for Hearing (filed May 15, 2003).

<sup>5</sup> Respondent's Brief at 2 (filed Nov. 6, 2003).

<sup>6</sup> Brief of the Appellee/Claimant at 2 (filed Nov. 19, 2003).

<sup>7</sup> P.H. Trans. at 6 and 7.

respondent received that claimant was alleging injuries from the accident was the certified letter from claimant's counsel dated May 14, 2003, which was received by respondent on May 16, 2003.

Claimant testified that he attempted to tell his employer that he had been injured by calling respondent's office on May 2, 3 and 5, but was unsuccessful in reaching anyone and his calls were not returned. Claimant's testimony is contradicted, however, by the fact that claimant spoke with his supervisor, Charles Hill, on May 1 and with the owner of the company, Paul Pitts on May 2, and made no mention of being injured. Likewise, claimant made no mention of being injured to his co-worker, Paris Checotah, who was with him in the truck at the time of the accident. Claimant attempts to explain this by pointing out that his symptoms did not appear until several days after the accident. But this explanation is inconsistent with claimant's testimony that he attempted to call and report his injuries beginning on May 2, the first day following the accident. Furthermore, claimant's testimony concerning the onset of his symptoms is inconsistent as well, at various times he describes their onset as immediate, two days, three days, four days and a "few days" after the accident.

Q. (Ms. Franklin) And on the few days following the accident, did you notice any type of symptoms or pain from after the accident?

A. (Mr. Swope) Yes.

Q. Can you tell the Judge in the few days following the accident what types of pain and what parts of your body that discomfort was associated with?

A. Pain in left shoulder, my neck and my lower back and my right knee.<sup>8</sup>

. . . .

Q. Is your condition [now] similar to what it was a couple of days after the accident?

A. Yes.<sup>9</sup>

. . . .

Q. Now, you told me at your deposition that you had neck pain days after your accident?

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<sup>8</sup> P.H. Trans. at 7.

<sup>9</sup> *Id.* at 10.

A. No, immediate.

Q. Immediately after?

A. Yes.<sup>10</sup>

. . . .

Q. (Mr. Carpinelli) When did you first feel any kind of physical symptoms that were due to this accident?

A. (Mr. Swope) Sunday, which was - - the 4<sup>th</sup> of May was Sunday, is when my back and neck started hurting.

Q. Your back and your neck or the back of your neck?

A. The back and my neck, and left shoulder.

Q. Okay, so your entire back and your left shoulder were giving you problems on Sunday, May the 4<sup>th</sup>?

A. Right

Q. When did your right knee start to bother you?

A. About May the 5<sup>th</sup>, on Monday.<sup>11</sup>

Claimant's supervisor, Mr. Hill, testified that he spoke with claimant the day of the accident and again during the next week after the accident. Claimant never mentioned injuries or complaints about his neck, back, shoulder, knee or arms.

A. (Charles Hill) The only complaint he [claimant] had was broken glass had gotten in his clothes and was causing irritation.

. . . .

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<sup>10</sup> *Id.* at 18.

<sup>11</sup> Swope Depo. at 28.

A. (Charles Hill) he complained that he had some - - probably some glass cuts on his hands from the impact. That was it.<sup>12</sup>

Mr. Hill said that the only injuries claimant mentioned to him were to claimant's arms and hands in "regards to glass."<sup>13</sup> Mr. Hill subsequently clarified during his testimony that claimant did not specifically say that he had injured his hand in the accident. Rather, Mr. Hill had noticed a bandage on claimant's hand when he spoke to him about a week after the accident. Claimant never said he was cut by the glass during his testimony. In fact, he specifically denied having received any cuts.<sup>14</sup>

Furthermore, claimant is not seeking medical treatment with regard to any alleged cuts or other injuries to his hands or arms from the broken glass. Rather, claimant is alleging muscular skeletal type injuries to his head, neck, back, shoulders and knee.

Claimant's first medical treatment came from Michael H. Munhall, M.D., who is board certified in physical medicine and rehabilitation and as an independent medical examiner. Claimant was sent to Dr. Munhall by his attorney for an independent medical examination on May 19, 2003. At the time of Dr. Munhall's May 19, 2003 examination, claimant's chief complaint was "spine pain."<sup>15</sup> Dr. Munhall also reported:

Today Steve describes residual left lateral neck pain, but denies headaches, dizziness, nausea, vomiting, or blurred vision. Lying down provokes left shoulder and mid back pain, and Steve is unable to sleep in a bed, but has spent the last several weeks in a rocker. Steve describes low back pain and right knee pain, encircling his kneecap and posteriorly. Low back and knee pain aggravates with sleeping, walking, sitting, and improves with extending the right knee.<sup>16</sup>

Dr. Munhall diagnosed cervical, thoracic and lumbar derangement syndrome, SI dysfunction, right biomechanical knee pain and left shoulder dysfunction syndrome, all of which he relates to the motor vehicle accident. "In summary, it is my opinion that Steve Swope sustained a cascade of injuries to his axial spine with associated biomechanical

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<sup>12</sup> *Id.* at 27 and 28.

<sup>13</sup> *Id.* at 35.

<sup>14</sup> Swope Depo. at 20.

<sup>15</sup> P.H. Trans., Cl. Ex. 1.

<sup>16</sup> P.H. Trans., Cl. Ex. 1.

dysfunction to the left shoulder and right knee in direct consequence of injury on 05/01/03."<sup>17</sup>

It is noteworthy, however, that claimant apparently gave Dr. Munhall a description of a somewhat more substantial accident than what claimant described in his preliminary hearing testimony. Dr. Munhall reports:

Steve provides a history of employment at Best Yet Refuse, hired on 01/28/03, as a driver. Steve was injured on 05/01/03, during the usual course of employment as a [r]efuse driver. He was returning on a run to the landfill, driving a sanitation truck without seat belt or harness. He was on a paved county road and encountered a transfer truck driving in the middle of the road. Their mirrors collided and the frame bent breaking Steve's window. Steve recoiled, jerking violently away from the collision, provoking immediate pain through his neck. Steve denies rollover, secondary collision, or striking his head. He did receive injuries to the low back and right knee as well, when he tried to suddenly break his vehicle. He received no urgent care or emergency room evaluation, and has had no medical, orthopedic, or osteopathic care or treatment.<sup>18</sup>

At respondent's request, claimant was examined on June 17, 2003 by Philip R. Mills, M.D., who is likewise board certified in physical medicine, as an independent medical examiner and in electroneuro diagnosis. The accident description claimant gave Dr. Mills varied considerably from that given to Dr. Munhall, and was more consistent with claimant's preliminary hearing testimony.

The patient states that he was in his usual state of health until 05/01/03. At that time he was the unrestrained driver of a ton and a half to two ton trash truck which was struck by a semi truck pulling a transfer trailer. Apparently it was a glancing strike which hit the mirror of his truck, breaking it off and breaking the door window which the patient states shattered. The patient denies any loss of consciousness. He states that he stopped the truck and called his boss. The patient was then able to complete his route after trading that truck out for a different truck. In the cab with him at the time of the accident was another employee who was uninjured. The patient states he had no realization that he was injured at the time and did not seek medical attention. The patient states that the glass shattered all over him and he pulled away to keep his eyes from being injured. Immediately the patient developed pain in the neck, shooting down his back into his left shoulder blade and his lower back. He also in trying to stop the truck after the accident jammed his right knee and had immediate knee pain. He denies any knee swelling or bruising. At that time he did not realize he had a knee injury as there was no swelling, bruising or locking. He states that there was an increase of knee pain two days later.

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<sup>17</sup> P.H. Trans., Cl. Ex. 1.

<sup>18</sup> P.H. Trans., Cl. Ex. 1

Apparently the patient failed to notify the supervisor of the injury and it appears that they may not have been informed or known of the problem. In any case he did not seek medical attention until 05/19/03.<sup>19</sup>

Claimant described pain in his neck, back, right knee and left shoulder. On physical examination claimant complained of pain in his right knee with ambulation and Dr. Mills noted "some non-physiologic and inconsistent findings with gait."<sup>20</sup> The claimant had full range of motion of his cervical spine and there was no muscle spasm. Range of motion of his shoulders, however, was "self limited more so on the left than on the right."<sup>21</sup> Claimant also had limited range of motion of his lumbo sacral spine but no spasm was noted. The range of motion of the knee was full. Dr. Mills concluded:

Subjective complaints: The subjective complaints are not consistent with the objective findings.

Diagnosis: 1. This patient has a lot of complaints of discomfort in multiple areas although there were no significant findings.

Causation: based upon the available information, to a reasonable degree of medical probability, I am unable to explain the patient's complaints from a minor event such as he described.<sup>22</sup>

Unlike Dr. Munhall, Dr. Mills found claimant had reached maximum medical improvement.

Sometime after his examination of claimant, Dr. Mills was provided a surveillance videotape taken of claimant.<sup>23</sup> Dr. Mills reported:

It confirmed my impression of non-physiologic findings and suggests there is a component of malingering. Certainly there were some excellent views of Mr. Swope ambulating without apparent difficulty and lifting without apparent difficulty. This

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<sup>19</sup> P.H. Trans., Resp. Ex. 2.

<sup>20</sup> *Id.* at 4.

<sup>21</sup> *Id.* at 3.

<sup>22</sup> *Id.* at 6.

<sup>23</sup> Wiechmann Depo. Ex. 1.



confirms the lack of significant findings [during] and I believe strengthens my view that there is no objective impairment or restrictions at this time.<sup>24</sup>

Based on the record compiled to date, the Board finds that claimant has failed to prove he suffered personal injury from the May 1, 2003 accident. Claimant has failed to prove that his alleged injuries and complaints are either work related or legitimate. Claimant's delay in reporting his alleged injuries, his delay in seeking medical treatment, the videotape, the medical opinion of Dr. Mills and claimant's inconsistent testimony combine to outweigh claimant's testimony that his alleged injuries are work related. Whereas Dr. Munhall apparently accepted claimant's history and complaints as true in reaching his conclusions, the Board does not. However, the Board also does not view the evidence and the conclusion to be reached from that evidence to be quite so obvious as does counsel for respondent. The Board strongly disagrees with the characterization of Judge Barnes' decision as "ludicrous" and disagrees that "to any rational observer, the claimant simply and utterly failed in meeting his burden of proving that he was injured at work."<sup>25</sup> Counsel should refrain from using such rhetoric in the future.

**WHEREFORE**, the Board reverses the October 8, 2003 Order entered by Administrative Law Judge Nelsonna Potts Barnes and benefits are denied.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of January 2004.

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BOARD MEMBER

c: Joni J. Franklin, Attorney for Claimant  
John F. Carpinelli, Attorney for Respondent and Nationwide Ins. Co.  
Nelsonna Potts Barnes, Administrative Law Judge  
Anne Hought, Acting Workers Compensation Director

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<sup>24</sup> P.H. Trans., Resp. Ex. 2.

<sup>25</sup> Respondent's Brief at 1 (filed Nov. 7. 2003).

